BAILING OUT OF A MEDIEVAL SYSTEM

A Proposal for Bail Bond Reform in Winnebago County

By Thomas A. Wartowski

It's time to bail out of a surety system that has its origins in medieval England and bring Illinois' criminal justice system and its pretrial release system into the 22nd Century.

The sheriffs of Nottingham used cash as surety that a person charged with a crime would return for trial. And if the sheriff thought the suspect was too dangerous to release, he would simply deny bail. Nine hundred years later we're still doing the same thing.

We need to change. We need to change a culture that has evolved into giving us the false sense of security that somehow money offers us protection.

In allowing his sheriffs to set bond, Richard the Lionheart was concerned about two things: that the defendant might flee and/or that the defendant posed a safety risk to the community. Risks of flight and safety. Those are the same concerns we have today. In fact, we've codified them throughout Article 110 of Chapter 725 of the Illinois Compiled Statutes.

Cash, however, is an inappropriate way to address those concerns. It is ineffective. It is contrary to modern principals of jurisprudence. It is generally inconsistent with state law. And, it can be argued, it's unconstitutional.

Cash is ineffective because the posting of any amount of money does not lessen either of the risk issues.

> Risk of flight: the posting of relatively minor amounts of money is unlikely to deter a defendant from fleeing or failing to come to court – even if he posted the money himself, which often is not the case.
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> A small but significant percentage of a jail's population at any one time is made up of defendants who failed to appear in court. For the most part, experience has shown, they failed to appear because they forgot. (Generally speaking, the majority of defendants are not very well organized. They don't keep calendars or own Palm Pilots.) And as for defendants truly intent on fleeing, virtually no amount of money will guarantee their return.
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> Risk of safety: a defendant who posts cash bond is no less likely to drink and drive after a DUI arrest or beat his wife after a domestic battery arrest or burglarize a home after a burglary arrest than the defendant who is released without posting any money.
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> The only difference between two similarly charged defendants whose bond amounts are identical and one posts bail but the other does not is wherewithal. One had the money and the other did not. The risks of flight and/or safety did not change by virtue of having posted bond. And, given the likely demographical profiles, the financial requirement runs the risk of being discriminatory.

A better system is one that directly addresses the risks a defendant poses: a bail system that identifies the risk factors, has the ways and means to effectively reduce those risks, and imposes them as conditions of release.

A system that allows a defendant charged with DUI, for instance, to be released but requires him to undergo random breathalyzer tests, report to a court officer and/or be assessed and treated for substance abuse is far more effective at reducing the risk factors than a system that frees him if he can come up with some money. In the first instance the defendant is allowed to continue his daily activities, be with his family, work or look for employment, and to have his needs immediately addressed while intervention is most effective.

This systemic approach is the official position of and strongly advocated by the American Bar Association, the National District Attorneys Association, the National Association of Pretrial Services Agencies, and the U.S. Department of Justice.

Indeed, even Illinois statute explicitly directs: "*Monetary bail should be set **only** when it is determined that no other conditions of release will reasonably assure the defendant's appearance in court, that the defendant does not present a danger to any person or the community and that the defendant will comply with all conditions of bond*." The statute encourages release on recognizance and encourages use of criminal contempt charges (i.e. re-arrest) to compel compliance.

All of the components needed to implement such a "Risk Factor" system are in place in all of the larger counties in Illinois. All that's needed is a change in mindset – a shift in paradigm that focuses on risks and conditions, not money. And, a little tweaking in procedure.

Pretrial Services. The hub of a successful system is Pretrial Services. Pretrial Services, after gathering and reviewing information about the defendant and circumstances surrounding his arrest, should:

1. Identify what risks of flight and safety, if any, a defendant poses;
2. Evaluate the degree of those risks;
3. Determine what available resources would minimize those risks;
4. Recommend to the court a set of conditions for the defendant's release consistent with the findings in 1, 2 and 3.

Those conditions under Illinois Statute 725 ILCS 5/110-10 (Conditions of Bail Bond) provide for extremely broad range of possibilities. The most frequently used include:

- Regular reporting to a Pretrial Services officer
- Random tests for alcohol or drug consumption
- Prohibition of alcohol consumption
- Employment
- Going to School
- Taking of prescribed medication
- Mental health assessment and/or treatment
- Counseling of various kinds

- Treatment of various kinds
- Classes for anger management, parenting skills, etc.

In some instances, Pretrial Services might recommend that a Defendant not be released at all because risk factors cannot be adequately reduced. Or that he be confined to Periodic Imprisonment, Electronic Supervision or Day Reporting Center, with or without other conditions.

To a large extent the above functions are inherent in what most Pretrial Services already try to do but they lack clear focus on the objectives: to identify the risks and their causes and to make specific recommendations to address those risks and causes. As it is, Pretrial Services largely focus largely on monetary bonds.

Prosecution. Prosecutors, too, need to shift focus. Rather than looking to keep defendants in jail, prosecutors should look for ways to keep them out – permanently. In many instances conditions of release involve interventions that offer the defendant an opportunity to avoid future criminal activity.

As defenders of justice and the Bill of Rights, prosecutors should be mindful of a defendant's innocence until proven guilty.

It is easy to get wrapped up in emotions and seek a high bond so as to punish a defendant by keeping him in jail -- without benefit of trial. Or to be overly zealous and strategically encourage the court to keep a defendant in jail, knowing that an in-custody defendant is more likely to plead guilty. Or to justify the setting of bond amounts as a form of early fine collection.

It is those kinds of prosecutorial rationalization, however, that led England's Parliament to enact a series of laws which, over time, evolved into the legal principles our forefathers adopted when they penned the Eighth Amendment.

Judiciary. Judges are the final cog in the wheel of justice who determine what bail system to use.

The culture of monetary bail is deeply entrenched in five centuries of tradition. It is natural and comfortable. Setting monetary bail amounts is easier and quicker than examining a defendant's profile and identifying specific conditions. Requiring a defendant to post money is also politically safer. If a defendant commits a crime the public is less apt to be outraged if the newspaper headline reads "Judge set bond at $10,000" than "Judge releases defendant."

Judges of today, however, need to change the culture and establish a new tradition. They have the resources to address the risks their predecessors were poorly equipped to handle. The only resource lacking today that medieval England had an ample supply of is jail space.

The vast majority of inmates in the county jail are awaiting trial. Not convicted. Waiting for their day in court. Do all of them need to be kept in jail? Should they be? A Risk Factor Bail System would help us decide.

Post Script: Ideally, pretrial conditions set by a judge can help determine how a case progresses through the criminal justice system. A defendant charged with possession of an illegal substance, for instance, might see his case dismissed or charges reduced if he successfully complies with the court's conditions. Or, a sentencing judge might consider the completion of the conditions as part of the sentencing order of a cooperative defendant, if convicted.

Editor's Note: Tom Wartowski, a former prosecutor, was appointed Jail Population Analyst under a court order by the U.S. District Court of Northern Illinois to reduce overcrowding of the Winnebago County Jail. He drafted this white paper during that assignment in 2005; localized data and other information has been redacted.